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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

METRO FORD TRUCK SALES, INC.,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. Did the lower courts err when they ruled that there always must be proof of an independent "contract" between the defendant and some third party before liability can be found for violation of the Sherman Act?

2. Is there a "functional availability" defense to Robinson-Patman liability, and if so, is it applicable when a manufacturer offers equal prices to dealers *only* when they are bidding to re-sell the exact same product to the same retail customer at the same time?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Metro Ford Truck Sales, Inc., has no parent company, nor any nonwholly owned subsidiaries.

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Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed June 26, 1998 ..... 1a

Appendix B — Amended Memorandum Order Of The United States District Court For The Northern District Of Texas, Dallas Division Dated And Filed October 20, 1997 ..... 18a

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Texas is set forth in Appendix A at 1a. The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Appendix B at 18a. Appendix C is the order denying rehearing and *en banc* review at the Fifth Circuit at 32a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on 26 June 1998. The suggestion for rehearing en banc was overruled by the Fifth Circuit on 28 July 1998.[1] Thus, Metro had until 29 October 1998 to file this Petition.

There has been no order granting an extension of time to file the petition for a writ of certiorari.

This Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. § 1254(1).

Rules 29.4(b) and (c) of this Court do not apply.

STATUTES INVOLVED

This case involves 15 U.S.C. §§ 1, 13a and 15, which state in relevant part as follows:

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1. Under Supreme Court Rule 13.3, the Fifth Circuit treats suggestions for rehearing en banc as petitions for rehearing. Local Rule Internal Operating Procedure for the Fifth Circuit, Local Rule 35, **Handling of Petition by the Judges; Panel Has Control**: "A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed."

15 U.S.C. § 1: Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 13a: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction or sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined

not more that $5,000 or imprisoned not more than one year, or both.

15 U.S.C. § 15 (partial): (a) Amount of recovery; prejudgment interest: Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

STATEMENT OF THE CASE

The District Court dismissed Metro's vertical price fixing and price discrimination claims by summary judgment. The Fifth Circuit affirmed.

A. Relevant Facts.

One of Ford's many product lines is called "heavy trucks." Unlike all other products, however, Ford does not sell heavy trucks at retail nor do dealers re-sell based on a "manufacturer's suggested retail price." Rather, Ford sells heavy trucks exclusively to dealers like Metro (at wholesale prices determined as set forth below), who then retail them to the final consumers on a sale-by-sale basis.

Even though Ford's franchise agreement requires Ford to publish all prices and discounts to its dealers and to sell heavy trucks to its dealers for the published prices, Ford does not do

so.[2] Instead, Ford publishes *nominal* wholesale prices, called "wholesale delivered prices," which are intentionally set by Ford as much as 40% HIGHER than the *retail* prices the trucks can ordinarily command in the marketplace and are thus purely fictional. By intentionally setting the wholesale delivered price higher than the retail market will bear, Ford guarantees that dealers must apply for wholesale price discounts.

Ford sets and determines the final or "true" wholesale price of all heavy trucks on a deal-by-deal basis. Ford sets these true wholesale prices by first determining the maximum ***retail*** price the dealer's prospective customer will pay for a truck or package of trucks (usually referred to as a "deal" or "bid") by making the dealer tell Ford the price the dealer believes the retail customer will pay. Ford then decides whether to grant discretionary discounts off wholesale delivered price, referred to as "Competitive Price Assistance" or "CPA" discounts, that reduce the wholesale price to its ultimate true level, just under the anticipated retail price. If Ford elects not to grant any CPA, or grants insufficient CPA, the deal falls through.

By this method of pricing, Ford accomplishes three things. First, Ford controls the maximum amount of profit its dealers earn; by setting CPA at a level only enough to reduce the wholesale price to, say, 2% below the anticipated retail price, Ford allows its dealers only enough leeway to earn the amount of profit Ford deems appropriate. Second, Ford can dictate the customer base of each dealer by refusing to grant CPA in favor of retail customers Ford "disapproves" of. Third, and ultimately more importantly from an antitrust perspective, Ford uses the CPA program to fix the lower limit of the price range (i.e., the

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2. Because Ford does not publish its prices and discounts, Ford was found liable on summary judgment for breach of contract by the 44th Judicial District Court, Dallas County, Texas, cause no. 94-7174-B, on 24 June 1998 following remand from the federal court.

price floor) below which a dealer cannot profitably resell a truck. Ford asserts that because it fixes retail prices "unilaterally," it can do so with impunity.

Contrary to what the Fifth Circuit apparently believes, Ford's CPA discounts are *not* given to every dealer in equal amount. Ford admitted in discovery that it discriminates in CPA discounts depending on who the dealer intends to resell the trucks to. If a particular dealer never tries to resell to a particular end user Ford deems deserving of high CPA, that dealer never receives high CPA regardless of the purchasing volume of the dealer or any other dealer-specific criteria. This is because CPA (if given) is supposed to be "passed on" to the retail customer in the form of lower price, NOT retained by the dealer as profit. These facts are not disputed.

Against the charge of price discrimination, Ford relies on a purported "defense" or exception to Robinson-Patman liability: the so-called "functional availability" defense. But Ford adds a twist to the exception: two Ford dealers receive equal CPA (and hence equal wholesale prices) ***only*** in deals where those dealers are in head-to-head competition (i.e., where they are bidding for the same sale to the same retail customer at the same time). For example, if Ford gives $5,000 in CPA to dealer A (hereafter referred to as the "benchmark" dealer) who is reselling to Ryder Truck Rental, Ford will likewise give $5,000 in CPA to other Ford dealers, but **only if** those other dealers are also attempting to resell the same trucks, to Ryder, at the exact same time as the benchmark dealer. In every other situation, Ford admits it does not even *attempt* to "equalize" the discounts offered on its trucks.

B. Procedural Background.

The District Court took jurisdiction of this case in accordance with 15 U.S.C. § 15a, which gives federal courts jurisdiction over all Robinson-Patman claims.[3]

On the merits of Metro's Sherman Act claim, the District Court determined that because Metro did not show the existence of a separate contract between Ford and some unidentified third-party, Ford's activities did not implicate the federal antitrust laws. *See* Appendix B, pp. 24a-25a.[4]

As to the Robinson-Patman claim, the District Court found that because Ford allegedly offers the same "equalized" prices to its dealers (even though Ford claims it does so *only* when dealers are in head-to-head competition), Ford offers its CPA discounts on a "functionally available" basis, and hence within the exception to Robinson-Patman liability found in *AAA*

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3. Actually, this case was removed from Texas state district court in May 1995, when Ford alleged that Metro had pleaded a federal price discrimination claim. The District Court overruled Metro's motion to remand, even though Metro insisted that it had not pleaded any federal claims in state court. Following that decision by the District Court, Metro amended its pleadings to assert federal antitrust claims, invoking the jurisdiction of the District Court under 15 U.S.C. § 15a.

4. The District Court's comment: "It is noteworthy that Metro does not allege an agreement between itself and Ford" is quite curious. The existence of the Sales and Service Agreement between Ford and Metro was never disputed, nor was it disputed that this agreement is the contract under which Ford prices and sells trucks to Metro. Metro had pleadings on file alleging breach of the Sales and Service Agreement, and Ford admitted the existence of the agreement both in its pleadings and in discovery. Indeed, Ford itself alleged a cause of action in this case *for breach of the same agreement* by Metro. This erroneous belief by the District Court, that there was no contact between Metro and Ford, probably contributed to the errors that followed.

Liquors, Inc. v. Joseph E. Seagram and Sons, Inc., 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). Appendix B, pp. 26a-28a.

The Fifth Circuit affirmed the District Court on both counts. *See* Appendix A, pp. 7a-11a. In affirming the Sherman Act decision, however, the Fifth Circuit inexplicably ignored recent precedent concerning a case virtually identical to our case (*Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir.), *cert. denied*, 96 S. Ct. 1409 (1976)), incorrectly applied long-standing Supreme Court precedent (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)), and thus left the law concerning vertical price-fixing in a state of utter confusion.

As to the Robinson-Patman count, the Fifth Circuit adopted a heretofore-unknown exception to price discrimination liability: "functional availability *on the same transaction to the same resale customer*." This new exception, as discussed below, will undoubtedly foreclose *any* future price discrimination actions under that statute because of the ease with which such a defense can be asserted and the impossibility of refuting it.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S OPINION DIRECTLY CONTRADICTS SETTLED PRECEDENT AS TO THE BURDEN AND TYPE OF PROOF NEEDED TO ESTABLISH A *PRIMA FACIE* CASE UNDER THE SHERMAN ACT FOR VERTICAL PRICE FIXING.

A. Confusion of the Law.

The decision below departs dramatically from the historical and customary *prima facie* case of vertical price fixing under federal law.

Vertical price fixing is fundamentally different from horizontal price fixing. In a horizontal case, there are *always* two or more parties who have combined or conspired to fix or control prices charged to their customers. The "combination or conspiracy" language of the Sherman Act is usually implicated because the defendants are usually not so obtuse as to have reduced their scheme to a written contract.

However, in *vertical* price fixing cases, the claim revolves around a single manufacturer or seller dictating the prices at which its buyers, usually dealers, can *resell* the products. By its very nature, such a case would not necessarily involve more than one defendant, and hence vertical price fixing may be found based on a "contract" (usually a franchise agreement as in *Dr. Miles* and *Greene*) that is used to manipulate prices, *without showing a combination or conspiracy among several defendants.*

Over the last several years, this Court has published several opinions the Fifth Circuit erroneously interpreted as saying that

there must always be more than one defendant-type entity involved before antitrust liability can be found. The courts below discussed this principal under the rubric of the so-called "unilateral action" exception to antitrust liability. Cases such as *Monsanto* and *Business Electronics* are supposedly the catalysts for this "exception."

However, a *careful* reading of the prior precedents of this Court does not support such an interpretation. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a dealer-termination case, there was found an "agreement" (which took the form of a "conspiracy"; *Monsanto*, 465 U.S. at 765) between the distributor and one or more of its dealers to terminate a "cost-cutter" dealer who refused to go along with the pricing scheme of the distributor. That "termination conspiracy" was the cornerstone of the plaintiff's case, *not* the franchise contract which allowed the manufacturer to set and control resale prices. *Monsanto* is thus off-point.[5]

Likewise, in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), another dealer-termination case, the plaintiff's termination was due to complicity between the distributor and another dealer who were angry over the plaintiff's discount pricing. Here again, the "combination or conspiracy" between the distributor and the other dealer was the trigger for liability. *Business Electronics* reiterated the rule that even unilateral vertical price restraints

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5. Discussion in *Monsanto*, 465 U.S. at 762, reiterated that *unilateral* vertical price fixing was *per se* illegal, meaning that unilateral action *can* support a [vertical] price-fixing case. Similarly, in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), this Court held that "unilateral" vertical price fixing is *per se* illegal. The Fifth Circuit's belief that all unilateral action is immune from the reach of antitrust law is therefore wrong.

are *per se* illegal, in part because they "facilitate cartelization." *Business Electronics*, 485 U.S. at 725-26. *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977) (vertical price restraints are always *per se* illegal).

Both lower courts obviously misread this Court's rulings in *Monsanto* and *Business Electronics* by holding that there must be proof of a separate "contract" between the antitrust defendant and some third party (in *Monsanto* and *Business Electronics*, the third party was another dealer) before the Sherman Act is triggered. This was indeed the fact pattern in those cases, but neither case suggested — much less held — that such a third-party agreement or "termination conspiracy" was a prerequisite to *all* vertical-price-fixing causes of action.

The Court in *Business Electronics* did say in *dicta* that there must ordinarily be some "agreement on the price or price levels" before antitrust liability will be found. *Business Electronics*, 485 U.S. at 726. However, this Court has repeatedly held that such an "agreement" need not be express but can be implicit from the dealings of the parties. *See, e.g., Business Electronics*, 485 U.S. at 731-33; *Monsanto*, 465 U.S. at 766; *Parke, Davis*, 362 U.S. at 40, 45-46.

In our case, we have an implicit "agreement" on price, the terms of which are set and enforced by Ford through its absolute control of the CPA program. Dealers "agree" to sell at the retail prices Ford fixes *because they have no choice but to do so.* Ford's ability to unconditionally compel compliance with the retail-price agreement does not make it any less of an "agreement," it just demonstrates the power Ford has over its dealers and their relationship. Ford uses the same "lever" as Monsanto used to enforce compliance: the threat that Ford will cut off the supply of [marketably-priced] trucks unless dealers

sell at Ford's set prices. At the very least, this issue should have gone to the jury. *Business Electronics*, 485 U.S. at 733.[6]

To argue that Ford does not coerce compliance by cutting off the supply of the trucks themselves, but rather cuts off the supply of price discounts that make the trucks capable of resale, is to elevate form over substance. This Court has *always* pierced through such nonsensical distinctions: "[The defendant's] methods were as effective as agreements in producing the result that 'all who would deal in the company's products are constrained to sell at the suggested prices.' " *Parke, Davis*, 362 U.S. at 42 (citing to *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922)). Ford has merely dressed up this ancient form of coercion in new clothes, hoping to avoid scrutiny.

In our case, as pointed out to the courts below, Metro is not complaining about being forcibly terminated pursuant to any conspiracy between Ford and another dealer, so the *rulings* in *Monsanto* and *Business Electronics* are off-point.[7] Rather,

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6. To imply that Ford does nothing more than what is allowed by *United States v. Colgate & Co.*, 250 U.S. 300 (1919) is simply wrong. Appendix B, fn. 12. Not only has the holding in *Colgate* been limited to the *exact* fact pattern involved in that case, but Ford *admittedly* goes far beyond merely announcing prices and refusing to deal with those who do not conform. Indeed, the state court's finding that Ford breached the franchise contract was based on the undisputed fact that Ford does NOT "announce" (i.e., publish) its prices as the franchise agreement requires. The District Court's statement that "Ford set only wholesale prices, which it is legally entitled to do" (Appendix B, page 25a) is contradicted by the undisputed factual record in the case — and further — is not a correct, complete or controlling statement of the law.

7. The erroneous belief that Metro is complaining about Ford's threatened termination of its franchise is an error that has infected this case ever since the District Court first made it. *See* Appendix B, p. 25a,

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Metro is objecting to illegal price fixing by Ford *while Metro is still a dealer*, because Metro is suffering lower profits, and Metro's customers are paying higher prices, than they would otherwise realize and pay in the absence of Ford's control of the retail market.[8]

B. Precedent Ignored.

Also, for some unexplained reason, the lower courts *both* totally ignored a standing Fifth Circuit precedent directly on point to our case: *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir.), *cert. denied*, 96 S. Ct. 1409 (1976).[9] In *Greene*

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footnote 8. Metro has never argued or pleaded that the threatened termination of its franchise is the basis for its price fixing claim, nor does Metro suggest that such threatened termination alone would provide a cause of action under federal antitrust laws. However, this error by the District Court is apparently the instigation for the lower courts going off on the *Monsanto* "dealer termination" line of cases instead of focussing on the correct *Dr. Miles/Greene* line of cases for the rule of decision. Hopefully, the Supreme Court will recognize and straighten out this error so the decision will *at least* be based on the correct legal theory and precedents.

8. Ford was found liable for vertical price fixing under Texas state law by the 44th Judicial District Court on 26 June 1998, based on *Ford Motor Co. v. State of Texas*, 175 S.W.2d 230 (1943). This decision is not yet final.

9. Interestingly, a court in the Eleventh Circuit correctly applied *Greene* and *denied* a motion to dismiss a vertical price fixing claim relating to Ford's CPA program. *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 779 F. Supp. 1345, 1351 (N.D. Ga. 1990). That same court two years later again examined *Greene*, and dismissed the Sherman Act claim of Capital Ford *solely* on the basis of lack of evidence, *not* the inapplicability of *Greene*. *Capital Ford Truck Sales, Inc. v. Ford Motor*
(Cont'd)

(as in our case), the only "contract" at issue was the franchise contract between General Foods (the defendant) and its dealers, among whom was the plaintiff, Mr. Greene. The court found that General Foods used its franchise contract to effectively fix and control retail prices using a discriminatory pricing and discount program identical to Ford's CPA program. That is, General Foods set a price floor below which dealers, including the plaintiff, could not resell coffee and other products to certain of the dealers' retail customers. In *Greene*, Judge Wisdom condemned General Food's pricing scheme as a *per se* violation of the Sherman Act, and this Court denied certiorari. *Greene* was founded on settled Supreme Court precedent that a franchise agreement alone is enough of a contract to trigger the Sherman Act. *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (the only "contract" involved was the franchise or distributorship agreement).

Greene and *Dr. Miles* undoubtedly provide the correct pattern to follow in situations such as our case. The lower courts' silence in regard to those precedents leaves the status of price-fixing law in limbo because there are now two lines of authority (*Metro* and *Greene*) which are directly contradictory of each other, neither of which distinguishes, overrules *or even mentions* the other. Practitioners in the Fifth Circuit — and elsewhere for that matter — now lack the ability to confidently advise their clients about the state of the law. Query: can a defendant safely conduct business merely by following the *Metro* decision, or must it *also* still be aware of and comply with *Dr. Miles* and *Greene*? The Fifth Circuit does not answer

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Company, 819 F. Supp. 1555, 1582-83 (N.D. Ga. 1990). We have no similar "lack of evidence" problems in this case. Thus, since *Greene* apparently is still the law in the Eleventh Circuit (or at least in Georgia), but not (anymore) in the Fifth Circuit, there is a "conflict among the courts" regarding vertical price fixing law that must be resolved.

this question. This Court should do so. Supreme Court Rule 10(a).

C. National Impact of Decision.

There is evidence in this case and others (notably *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-46 (8th Cir. 1983)), that the discount system employed by Ford is also being used by other heavy-truck manufacturers in the United States. Franchising is a popular method of business in many other industries as well. This case therefore has far-reaching consequences to those industries, their franchised dealers, and all consumers of their products. Supreme Court Rules 10(a) and 10(c).

Under the Fifth Circuit's ruling, Ford and other manufacturers may now *legally* control the downstream, retail prices for their products.[10] The evils identified in *Dr. Miles, Albrecht v. Herald Co.*[11] and *Greene* will go uncorrected and

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10. The District Court apparently believed that Ford's price fixing scheme was "pro-competitive" and thus *helped* retail customers. *See* Appendix B, p. 26a: "Ford's CPA program is actually pro-competitive. The effect of the discount program is to lower retail prices to customers and increase interbrand competition." Sure, the CPA program lowers retail prices, but *only* to those special customers *Ford* deems deserving of such lower prices; all the others (which includes MOST retail consumers, by the way) pay *inflated* prices. It is not Ford's place to dictate the *retail* prices of its products; that power should reside with the dealers who are in competition with each other and other competing-brand dealers (this is the "signal prerogative of the independent businessman" mentioned by the Fifth Circuit in *Greene*, 517 F.2d at 656).

11. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). *Albrecht* was recently overturned in part in *State Oil Co. v. Kahn*, 118 S. Ct. 275 (Cont'd)

will undoubtedly multiply unless this Court takes action. Has Ford really discovered a loophole in the antitrust laws?

II.

THE LOWER COURTS IMPROPERLY CREATED A BRAND-NEW DEFENSE TO ROBINSON-PATMAN LIABILITY THAT CANNOT BE SQUARED WITH PRECEDENT NOR WITH THE LANGUAGE OR PURPOSE OF THE ACT, AND WHICH SOUNDS THE DEATH KNELL FOR PRIVATE ENFORCEMENT OF THAT STATUTE.

The lower courts in our case have created a new exception to liability under the Robinson-Patman Act that cannot be found in the statute itself, nor in any other case precedent or scholarly writings. It is no exaggeration to say that this new exception threatens to swallow the entire Robinson-Patman Act.

A. Functional Availability: A Real Defense?

A defendant has long been able to avoid liability by proving that its price differences between and among its dealers are "functionally available" to all of them.[12] However, "functional

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(1997). However, the carefully-worded language in *Kahn* reveals that only price *ceilings* will henceforth be judged under the rule of reason; price *floors* are still *per se* illegal. Metro complains of fixed price *floors* in this case.

12. The so-called "functional availability defense" to Robinson-Patman liability, while rampant in the circuit and district court case law, is nevertheless of questionable origin and validity. This Court has never addressed or condoned such an exception, nor have lower courts

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availability" has heretofore *also* required that each dealer be able to procure the same lower prices **based solely on its particular status as a dealer**. That is, *all dealers* must have been offered the same lower prices, or none of them could be. With the ruling of the courts below, that rule has changed — and none too subtly.

Now a defendant can escape liability — NOT by showing that all dealers are able to secure the lower prices simply by virtue of their status as dealers — but by merely *asserting* that each dealer "would have been given" the same low wholesale price if only it had been in head-to-head competition with the benchmark dealer.[13] There is no precedent in United States history that suggests such a defense is — or should be — the law. Supreme Court Rule 10(c).

The Fifth Circuit's new defense to Robinson-Patman liability actually takes the questionable defense of "functional availability" a quantum leap beyond its already-stretched borders. In doing so, the Fifth Circuit has issued an opinion that "overrules" *Morton Salt*: a distributor can now discriminate on price in every situation *except* where dealers are in head-to-head, intrabrand competition. That is exactly what Ford does, and the Fifth Circuit says it is lawful.

Ford's "equalization" policy is nothing more than a transparent attempt to subvert the core purpose of the Robinson-

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proposed any convincing arguments for its existence. Indeed, it seems to be directly contrary to the teachings of *FTC v. Morton Salt*, 334 U.S. 37 (1948). Metro welcomes the opportunity to address this most-important issue in a full brief to this Court, perhaps to the end that the issue may be finally decided upon proper and thorough review.

13. This was Ford's "equalization" defense, which the lower courts accepted.

Patman Act. That Act is designed to prevent manufacturers from charging some dealers higher prices just because they do not have the market power or customer base to "command" the same low wholesale prices as their competing "favored" dealers. *See Morton Salt,* 334 U.S. at 42-44. The ultimate problem sought to be prevented is apparent and inescapable: the higher wholesale prices are either passed on to the customers of those disfavored dealers, or the customers find out about the price difference and start to shop with the "favored" (and hence lower-priced) dealers. In either event, antitrust harm is evident.

If the customers elect to buy from the disfavored dealers and pay the higher prices, they are harmed in their pocketbooks. If instead they switch to the dealers who have lower prices, this will eventually drive the disfavored dealers out of business, creating (or at least hastening) a monopoly or cartel situation in the marketplace (the "weed in the seed" described by the Senate Judiciary Committee when it was considering passage of Robinson-Patman). *See Morton Salt*, 334 U.S. at 48, n.18. Accord: *Business Electronics*, 485 U.S. at 725-26.

Ford's scheme implicates both of these harms. Until they realize that other dealers can and will sell to them cheaper, Metro's customers unwittingly pay far more for the same products than do other dealers' customers (evidence in the record shows this difference can be as much as $20,000 for a truck retailing at only $80,000). Also, Ford can decide which dealers receive lower prices, which in turn allows Ford to choose the dealers it believes it can later "control" and favor them with lower prices all around (with the sole exception being when two dealers happen to be in head-to-head competition — and become aware of it somehow — Ford *might* give both dealers the "same price" under its equalization policy). Even Ford's "equalization" idea, of course, presumes that Ford *truthfully* informs each dealer when they are in head-to-head competition

with another dealer for a particular deal (dealers rarely, if ever, know this information on their own), *and* that Ford then offers each of them the "same prices" accordingly.[14] But why should those assumptions be made, especially in the long run, and especially as the District Court did on summary judgment?

B. Mere Assertion Does Not a Defense Make.

The resolution of this case below turned **not** on the proven reality of Ford's "equalization" program, but instead on Ford's self-serving *representations* that equalization occurs. There was no evidence offered by Ford that it ever actually "equalized" two dealers on any particular transaction.

What manufacturer cannot simply *allege* (without much fear of challenge) that the plaintiff "would have received" the same low price if only it had been in head-to-head competition with the benchmark dealer, *especially* if the manufacturer need never **prove** "equalization" because it need never inform dealers of its true prices?[15]

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14. Since Ford admittedly does not publish its final prices and discounts to dealers, the unsuccessful dealer in a head-to-head deal must simply "take Ford's word for it" that it was offered "equalized" prices and lost the deal for "other reasons."

15. It is offered for the Court's consideration that Ford's franchise agreement, which requires Ford to publish all prices and discounts to its dealers (even though Ford breaches it), is an aberration. Most franchise contracts probably do not require the franchisor to publish prices offered to other franchisees. In those situations, franchisees will **never** learn whether competing dealers are being offered better prices unless they stumble on the evidence. But under the decision of the Fifth Circuit in this case, even if a franchisee stumbles on such evidence, the franchisor can escape liability by merely saying: "You *would have been* offered the same low price if only you had been in head-to-head competition with the favored dealer." It is plain to see that this interpretation of Robinson-Patman not only removes all of the bark from the statute, it removes all of the bite as well.

Also, intrabrand competition is not necessarily the norm in most markets. Where economics dictates that dealers maintain some distance from each other (as in the heavy-truck business), retail customers may not be able or willing to "shop" competing dealers selling the same brand. Under the ruling in this case, manufacturers can now discriminate among dealers (or even among *regions*, an express violation of 15 U.S.C. § 13a) with a ready defense available by merely saying to dealers: "The reason you paid a higher price was because you were not in head-to-head competition with the benchmark dealer for the same sale."

The Fifth Circuit's new exception/defense completely swallows the rule. Has the long-awaited judicial repeal of the Robinson-Patman Act finally occurred?

Given the continuing and increasing hostility of the federal courts to private enforcement of the antitrust laws, this decision by the lower courts is perhaps to be expected. However, if the statutory scheme envisioned by Congress relating to private enforcement is to be maintained, this Court must reverse the decision below. Certiorari is appropriate for that purpose.

CONCLUSION

The lower courts misinterpreted and misapplied settled precedent concerning vertical price fixing under the Sherman Act, hopelessly confusing this area of the law.

The lower courts have also created a brand-new exception to Robinson-Patman liability that does not square with the statute and cannot be defended. The new exception effectively kills private enforcement of the Robinson-Patman Act by providing a defense that can be raised purely by rote, with *or without* substance, while letting the defendant create and enjoy the market dysfunctions and inequities the Robinson-Patman Act was expressly written to prevent.

The decisions below are wrong and contrary to settled precedent. Certiorari should be granted to correct them.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 26, 1998

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-11218

METRO FORD TRUCK SALES, INC.,

Plaintiff-Appellant-Appellee,

versus

FORD MOTOR COMPANY,

Defendant Counter-Defendant/Third-Party Plaintiff-Appellee/Appellant,

DUANE KUPPER, ERIC MAGNUS, MIKE STECKLER,

Defendants-Appellants,

versus

DANIEL H. FOLEY,

Counter Claimant/Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

Before POLITZ, Chief Judge, REYNALDO G. GARZA and DENNIS, Circuit Judges.

Appendix A

POLITZ, Chief Judge:

Metro Ford Truck Sales, Inc. appeals an adverse summary judgment on its federal antitrust claims.[1] Ford Motor Company, Eric Magnus, Mike Steckler, and Duane Kupper appeal the remand of their third-party claim against Daniel H. Foley, Jr. under the Racketeer Influenced and Corrupt Organizations Act.[2] For the reasons assigned, we affirm.

BACKGROUND

Ford is engaged in the manufacture of various types of vehicles, including heavy, medium, and light duty trucks. At all pertinent times, Metro was a motor vehicle dealership licensed to sell and service Ford trucks, and Foley was the dealer-principal. The relationship between Ford and Metro was governed by Ford Truck and Ford Heavy Duty Truck Sales and Service Agreements.

The focus of this action is a pricing program implemented by Ford, known as Competitive Price Assistance. This program was used to reduce the wholesale price of a truck to authorized Ford medium and heavy duty truck dealers. During the 1990-94 period at issue, all Ford medium and heavy truck dealerships were eligible to receive, on every truck, a base level of CPA called "Sales Advantage." Sales Advantage CPA was obtained by calling Ford's CPA Hotline, and giving the operator basic information about the sale, including the customer's name, the vehicle specifications, and the vehicle options.

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1. Sherman Act, 15 U.S.C. § 1, and Robinson-Patman Act, 15 U.S.C. § 13(a).

2. 18 U.S.C. §§ 1961-1968.

Appendix A

In situations where the sales advantage CPA was insufficient, further procedures permitted a dealer to request additional price reductions, known as "Appeal CPA." The appeal process was initiated when a dealer submitted a CPA appeal form by facsimile to Ford's CPA Central. To justify the need for an Appeal CPA, a dealer had to provide information about the competitive situation surrounding the particular transaction at stake. Ford then evaluated the appeal, along with any additional information it had about the customer, to ensure that all Ford dealers bidding the same customer received an equal CPA, and that all Ford dealers could meet the competition from other original equipment manufacturers. Ford thereafter advised the dealer about the amount of additional CPA, if any, that would be allowed.

Specialized CPA also existed for large volume purchasers. This CPA usually was at a predetermined amount and could be obtained simply by calling the CPA Hotline and providing the customer's name and commitment number. Because these customers attracted so much competition, and ordered such a large volume of trucks, the amount of CPA was made readily available, alleviating the need for the dealer to demonstrate individually a competitive situation or to initiate a CPA appeal.

In response to complaints by another dealer that Metro was obtaining more CPA on bids to the same customer, Ford conducted an audit of certain sales Metro made using the CPA program. Ford concluded that Metro had been applying for CPA in the name of one customer, while actually selling the trucks to someone else; thus receiving more CPA than that to which it was entitled. Metro conceded that it sometimes misrepresented customers when claiming CPA, but alleged that Ford representatives instructed it to claim CPA in the name of its

large volume purchasers when the situation warranted CPA beyond Sales Advantage CPA. Ford employees, not surprisingly, denied that Metro was so instructed or that they had knowledge of Metro's practice prior to the audit. Accordingly, Ford determined to charge back the amount of CPA obtained by Metro on the misrepresented transactions, and to pursue termination of Metro's franchise agreements.

To prevent the threatened charge back or terminations, Metro filed the instant action in state court, seeking injunctive relief and asserting various state law claims against Ford and Ford employees Kupper, Magnus, and Steckler (hereinafter collectively referred to as "Ford"). Ford filed counterclaims against Metro and a third-party petition against Foley, alleging several causes of action under state law. Thereafter Metro filed an amended petition, which included a claim against Ford for price discrimination under the Texas Antitrust Act, and Foley filed a counterclaim against Ford for intentional infliction of emotional distress.

Ford removed the action to federal court on the basis that the Texas Antitrust Act does not prohibit price discrimination and, therefore, Metro's antitrust claim for price discrimination could arise, if at all, only under the federal Robinson-Patman Act, conferring federal question jurisdiction. The district court agreed with the basis for removal and denied Metro's motion to remand. Metro thereafter amended its complaint to assert specific claims for price discrimination under § 2(a) of the Robinson-Patman Act and for vertical price fixing under § 1 of the Sherman Act, and Ford amended its third-party complaint against Foley to include a RICO claim.

All parties subsequently moved for summary judgment. The district court granted Ford's motion for summary judgment on Metro's federal antitrust claims. Finding that state law predominated and a substantial overlap existed, the district court remanded the remaining state law claims, as well as the third-party RICO claim, to state court. Both Metro and Ford timely appealed.

ANALYSIS

Metro contends that the district court erred in (1) denying leave to designate experts and file expert reports beyond the scheduling order deadline; and (2) granting summary judgment in favor of Ford on its Sherman Act and Robinson-Patman Act claims. In its cross-appeal, Ford contends that the district court erred in remanding its third-party RICO claim, as well as the pendent state law claims.

Metro's first argument on appeal is that the district court erred in denying its motion for leave to designate experts and file expert reports out-of-time, or to recognize its supplemental disclosures. We review a trial court's decision to exclude expert witnesses as a means of enforcing a pretrial order under the abuse of discretion standard.[3] In so doing, we consider: "(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice."[4]

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3. **Geiserman v. MacDonald**, 893 F.2d 787 (5th Cir. 1990).

4. **Id.** at 791.

Appendix A

As a preliminary matter, we note that it is only the ruling on one expert, Dr. Keith Leffler, that is at issue. Absent from Metro's trial motion and its argument on appeal, is sufficient justification for the late designation of this expert witness. Metro essentially complains that Ford failed to provide supplemental discovery. Although this case had been pending for well over two years, and the scheduling order deadlines had been extended previously, Metro did not timely raise this issue in the trial court.

Nonetheless, Metro contends that the mere one week delay in designating this expert was nominal and resulted in no prejudice, mandating the grant of its motion. Metro fails, however, to note the lack of an accompanying written report, as required by the scheduling order and Rule 26(a)(2)(B), which results, necessarily, in the conclusion that the expert designation deadline was not merely one week late as it contends. Instead, Metro urges this court to recognize the filing of Dr. Leffler's report as timely under the supplemental disclosure deadline some three months later. We decline to do so. The purpose of supplementary disclosures is just that — to supplement. Such disclosures are not intended to provide an extension of the expert designation and report production deadline.[5] We therefore hold that the district court did not abuse its discretion in refusing to modify the scheduling order and in enforcing the time deadlines.[6]

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5. **Sierra Club v. Cedar Point Oil Co.**, 73 F.3d 546 (5th Cir. 1996).

6. We note that Metro appears to be urging this issue only in anticipation of reversal of the grant of summary judgment. Metro argued below that the need for experts could not be determined until after the district court ruled on the pending summary judgment motions. Because Metro is not claiming that this issue impacted its summary judgment positions, and in light of our decision affirming the grant of same, *infra*,

(Cont'd)

In its remaining arguments on appeal, Metro contends that the district court erred in granting summary judgment in favor of Ford on its federal antitrust claims. We review a grant of summary judgment *de novo*.[7] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[8]

Metro contends that Ford's CPA program constitutes vertical price fixing in violation of the Sherman Act. The district court found the lack of evidence of an agreement fatal to Metro's Sherman Act claim. Metro contends that the district court erred in this regard because the existence of a contract or agreement is not required for a vertical price fixing claim. Metro maintains that Ford's independent and unilateral actions are sufficient to support its claim. We do not find these contentions persuasive.

Section 1 of the Sherman Act expressly requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation.[9] "Independent action is not

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(Cont'd)

we perceive no prejudice to Metro as to this claim. **See Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.**, 48 F.3d 927 (5th Cir. 1995).

7. **Martin v. Memorial Hosp. at Gulfport**, 130 F.3d 1143 (5th Cir. 1997).

8. Fed. R. Civ. P. 56(c).

9. 15 U.S.C. § 1. Purely unilateral behavior is illegal under § 2 of the Sherman Act, but only when it threatens actual monopolization. Metro does not allege or offer evidence of monopolization; instead claiming restraint of trade, which is governed by section 1.

proscribed."[10] Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of a combination or agreement.[11] Thus, the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter.[12] Accordingly, we find and conclude that the

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10. **Monsanto Co. v. Spray-Rite Service Corp.**, 465 U.S. 752, 760 (1984).

11. **Id.**

12. **See id.**; **United States v. Colgate & Co.**, 250 U.S. 300 (1919); **Business Electronics Corp. v. Sharp Electronics Corp.**, 485 U.S. 717 (1988).

Metro contends nevertheless that Ford's unilateral actions are *per se* illegal without evidence of a contract under **Dr. Miles Medical Company v. John D. Park & Sons Company**, 220 U.S. 373 (1911). The flaw in Metro's reasoning is its failure to recognize the existence, and corresponding significance, of the systems of contracts involved in that case. The plaintiff, Dr. Miles Medical Company, had devised a system of contracts with its customers to maintain minimum resale prices at which its proprietary medicine products would be sold. The defendant, John D. Park & Sons, was a wholesale drug company which refused to enter into such a contract. The plaintiff charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines," procured its medicines by inducing the violation of the contracts. **Id.** at 381-82.

The plaintiff's right to relief depended on the validity of the restrictive contracts, making it the central issue before the Court. The Court found, however, that the contracts constituted unlawful resale price maintenance by restricting "the freedom of trade on the part of dealers

(Cont'd)

district court was correct in determining that the lack of a "contract, combination . . . or conspiracy" precludes Metro's Sherman Act claim.

Metro also contends that Ford's implementation of the CPA program resulted in price discrimination in violation of the Robinson-Patman Act. The district court found that Metro failed to demonstrate that the same level of CPA was not functionally available to all dealers and, thus, no evidence of price discrimination exists. Metro insists that summary judgment on this basis was erroneous because whether or not the discounts were equal, no such defense exists unless the discounts were cost justified or offered in good faith to meet competition. Again, Metro's contentions are not persuasive.

Section 2(a) of the Robinson-Patman Act provides that it is unlawful for a seller "either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality."[13] For its claim under § 2(a) of the Robinson-Patman Act to succeed, Metro must adduce evidence of an actual instance of price discrimination,

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who own what they sell." This finding that resale price maintenance is *per se* illegal under § 1 has been reaffirmed by the Court. **See United States v. Parke, Davis & Co.**, 362 U.S. 29 (1960); **California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.**, 445 U.S. 97 (1980); **Monsanto Co.**, 465 U.S. 752. In **Business Electronics Corporation**, however, the Court made it clear that vertical price restraints require an agreement or concerted action, and not just an effect on resale prices, to be *per se* unlawful. 485 U.S. 717. We thus focus on whether the restraint is unilateral or concerted for all aspects of a section 1 claim.

13. 15 U.S.C. § 13(a).

i.e. a difference in price charged to different purchasers or customers of the discriminating seller for products of like grade or quality.[14] If the challenged lower price was in fact — and not merely theoretically — made available to the allegedly disfavored purchasers, the seller cannot be held liable under section 2(a).[15]

This "functional availability" theory "is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute."[16] Nevertheless, the theory is clear and coincides with the purpose of the Act in that a price discount equally available to all purchasers for the same customer and product is not price discrimination.[17] As found by the district court, the record reflects that Metro was treated the same as all other Ford dealers with respect to CPA for the same customer, and products of like grade and quality. The record further establishes that the CPA program functioned to ensure that all Ford dealers issuing

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14. **FTC v. Anheuser-Busch, Inc.**, 363 U.S. 536 (1960).

15. **See, e.g., FTC v. Morton Salt**, 334 U.S. 37 (1948); **Capital Ford Truck Sales, Inc. v. Ford Motor Co.**, 819 F.Supp. 1555 (N.D. Ga. 1992).

16. **Precision Printing Co. v. Unisource Worldwide, Inc.**, 993 F.Supp. 338, 350 (W.D. Pa. 1998).

17. **See Morton Salt**, 334 U.S. 37. While some functional discounts may be covered by the cost justification defense or the meeting competition defense, these defenses present no bar to the use of the functional availability theory to demonstrate the lack of an essential element of the case (price discrimination), as alleged by Metro. See Kintner, Federal Antitrust Law, § 25.7, (1983) ("availability" is technically not an affirmative defense, but the negation of an element of the plaintiff's case).

bids to the same customer received equal CPA, and that all Ford dealers could meet the competition from other original equipment manufacturers. Metro concedes that the discounts were available to it on an equal basis with other Ford dealers. We therefore must find and conclude that price discrimination did not exist, and that no violation of the Robinson-Patman Act occurred.

Having found the grant of summary judgment in favor of Ford on Metro's federal antitrust claims to be appropriate, we turn to Ford's cross-appeal wherein it challenges the remand of its third-party RICO claim and the pendent state law claims.[18] Ford contends that the district court had no legal authority to remand its RICO claim to state court because the claim arose under federal law and was filed in federal court. Ford further contends that because the RICO and state law claims are interrelated, the factors of judicial economy, convenience, fairness, and comity require that all the claims be tried in the same court, making the remand of the pendent state law claims improper. We review *de novo* whether the legal authority to remand existed and, further, review the decision to remand for an abuse of discretion.[19]

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18. As an initial matter, we note that Metro contends that this issue was mooted by the state court's dismissal of Ford's RICO claim. Ford challenges this contention, and also submits that the remand of the state law claims remains at issue. Although we earlier were advised that the state law claims were scheduled to be tried in state court beginning in April 1998, we have received no additional information. Nevertheless, given our conclusion herein, *infra*, we need not resolve this dispute.

19. **Eastus v. Blue Bell Creameries, L.P.**, 97 F.3d 100 (5th Cir. 1996). The remand order was based on the district court's discretionary power under § 1441(c) and, thus, § 1447(d) does not bar review. **Id.**

The essential concept governing in this appeal, perhaps overlooked by Ford, is that the district court's jurisdiction was derived from a § 1441 removal.[20] When an action is brought to federal court through the § 1441 mechanism, "for both removal and original jurisdiction, the federal question must be presented by plaintiff's complaint as it stands at the time the petition for removal is filed and the case seeks entry into the federal system. It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim."[21] Similarly, the defendant's third-party claim alleging a federal question does not come within the purview of § 1441 removability.[22] The third-party claim, like a defense or counterclaim, is a pleading by the defendant. The third-party claim does not change the character of the plaintiff's complaint any more than does the defendant's other pleadings. Thus, the federal question alleged in the defendant's third-party claim does not, in and of itself, confer jurisdiction upon the federal court.

The initiation of Ford's third-party claim in federal court, as opposed to that in state court prior to removal, does not change its status. Such a result would be contrary to the rule that removal jurisdiction must be disclosed on the face of the plaintiff's complaint,[23] and that the basis to determine removal

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20. 28 U.S.C. § 1441.

21. 14A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3722, at 255-60. **See Gully v. First Nat'l Bank**, 299 U.S. 109 (1936).

22. While a third-party defendant may remove a case to federal court based on the third-party claim, a defendant/third-party plaintiff may not. **See Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury**, 622 F.2d 133 (5th Cir. 1980).

23. **Great Nothern Ry. Co. v. Alexander**, 246 U.S. 276, 281 (1918) ("It is also settled that a case, arising under the laws of the United

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jurisdiction so continues throughout the litigation.[24] To hold otherwise would unduly grant a defendant the power to manipulate removal jurisdiction once in federal court, despite overwhelming authority proscribing same.

Having determined that Ford's filing of its third-party-RICO claim in federal court after removal does not impact the court's removal jurisdiction and its corresponding remand authority, we turn to the remand decision.[25] After dismissing the federal antitrust claims, the court determined that state law predominated over the remaining claims, and that the interests of judicial economy, convenience, fairness, and comity warranted remand under § 1441(c).

(Cont'd)

States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant . . . , but that such conversion can only be accomplished by the voluntary amendment of his pleading by the plaintiff. . . .").

24. **Id.** at 282 ("the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and [] this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove . . . , but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.").

25. Once the claims on which removal jurisdiction was based were dismissed, the district court rightfully reevaluated its jurisdiction and the position of the action. **See Menchaca v. Chrysler Credit Corp.**, 613 F.2d 507, 511 (5th Cir. 1980) ("It is axiomatic that a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings.").

Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Thus, for remand to be proper, the claim remanded must be "(1) a separate and independent claim or cause of action; (2) joined with a federal question; (3) otherwise non-removable; and (4) a matter in which state law predominates.[26]

As an initial matter, we consider Ford's contention that district courts have no authority to remand federal claims. Although RICO is a federal cause of action, state courts have concurrent jurisdiction to adjudicate civil claims arising thereunder.[27] Thus, any attempt to equate "original jurisdiction" with "exclusive jurisdiction" in this instance would be error.[28]

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26. **Eastus**, 97 F.3d at 104.

27. **Tafflin v. Levitt**, 493 U.S. 455 (1990).

28. If the federal claim in this case fell within the court's exclusive jurisdiction, rather than concurrent, remand of the claim would be improper because the state court would be unable to hear the federal claim. Accordingly, a federal claim within the court's exclusive jurisdiction would not implicate § 1441 removal jurisdiction because the state court would have no jurisdiction at the outset. **See Arizona v. Manypenny**, 451 U.S. 232 (1981).

The cases relied on by Ford are distinguishable because therein the court sought to remand federal claims which would have been otherwise removable.[29] As discussed *supra*, Ford's third-party RICO claim could not, and did not, confer removal jurisdiction in this instance. In addition, we have since noted that the new § 1441(c) permits courts to remand an entire action, or distinct claims, both state and federal, if state law predominates.[30] We thus must find no merit in Ford's contentions.

In the case at bar, the federal antitrust claims constituted the basis of the court's removal jurisdiction, and were joined with Ford's third-party RICO claim. Because the third-party RICO claim could not provide removal jurisdiction, it qualifies as an "otherwise non-removable" claim. Thus, only the first and fourth elements of the § 1441(c) analysis can be disputed.[31]

The first element requires independence as well as separateness. "[W]here there is a single wrong to [the] plaintiff,

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29. **Buchner v. FDIC**, 981 F.2d 816 (5th Cir. 1993) (plaintiff's complaint conferred removal jurisdiction over claim sought to be remanded); **In re Wilson Industries, Inc.**, 886 F.2d 93 (5th Cir. 1989) (same); **Burks v. Amerada Hess Corp.**, 8 F.3d 301 (5th Cir. 1993) (same); **Smith v. Texas Children's Hosp.**, 84 F.3d 152 (5th Cir. 1996) (same).

30. **Eastus**, 97 F.3d 100 (and cases cited therein). **See also** 14A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3724 (Supp. 1997) (and cases cited therein).

31. We note that Ford misapplies the § 1441(c) analysis by assuming that the RICO claim forms the basis of jurisdiction and must be considered in relation to the state law claims. As discussed *supra*, this is error.

for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."[32] "If one claim depends on establishing liability under the other, the two cannot be found to be independent."[33]

We find that, in this case, the federal antitrust claims and the RICO claim are separate and independent. Metro sought relief from Ford based on its implementation of the CPA program, alleging price fixing and discrimination under the federal antitrust laws. In its third-party RICO action, Ford sought relief from Foley for alleged fraud and misrepresentation in the operation of the Metro dealership. Although the CPA program was involved in both the antitrust and RICO actions, the claims rely on different supporting facts and clearly seek separate relief for distinct wrongs.

Ford concedes that the RICO claim and the pendent state law claims are substantially related, calling for litigation in one forum. In fact, the RICO claim is so intertwined with the state law claims as to be difficult to treat separately. We perceive no incompatibility between state court jurisdiction and federal interests[34] and, thus, find that state law predominates. Accordingly, we find and conclude that § 1441(c) authorized remand of the third-party RICO claim, and we affirm that portion of the order. In light of this conclusion, and considering the interests of judicial economy, convenience, fairness, and

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32. **American Fire & Casualty Ins. Co. v. Finn**, 341 U.S. 6, 14 (1951).

33. **Eastus**, 97 F.3d at 104.

34. **See Tafflin**, 493 U.S. 455.

comity, we must conclude that the district court did not abuse its discretion in correspondingly remanding the pendent state law claims.[35]

The judgment appealed is AFFIRMED.

35. See 28 U.S.C. § 1367(c); **Carnegie-Melon University v. Cohill**, 484 U.S. 343 (1988).

APPENDIX B — AMENDED MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED OCTOBER 20, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO.
3:95-CV-1010-G

METRO FORD TRUCK SALES, INC.,

Plaintiff,

VS.

FORD MOTOR COMPANY, ET AL.,

Defendants.

AMENDED MEMORANDUM ORDER

The memorandum order of October 9, 1997 is vacated, and the following is substituted in its place. Before the court is the motion of the defendants Ford Motor Company ("Ford"), Duane Kupper ("Kupper"), Eric Magnus ("Magnus"), and Mike Steckler ("Steckler") (collectively, "defendants") for summary judgment on the antitrust claims of the plaintiff Metro Ford Truck Sales, Inc. ("Metro").[1] Also before the court is Ford's motion for partial summary judgment on its affirmative claims

1. Metro brings the antitrust claims under § 1 of the Sherman Act, 15 U.S.C. § 1, and § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Plaintiff's First Amended Complaint, Including Application for Permanent Injunction and Counterclaim of Daniel H. Foley, Jr. ("Complaint") ¶¶ 47, 49.

against Metro and third-party defendant Daniel H. Foley, Jr. ("Foley")[2] and for partial summary judgment on the affirmative claims of Metro and counter-plaintiff Foley.[3] Also before the court is the motion of Metro and Foley for partial summary judgment on Ford's counterclaims and third-party claims[4] and the motion of Metro for partial summary judgment on Ford's Robinson-Patman Act defenses. For the reasons set forth below, (1) the defendants' motion for summary judgment on Metro's antitrust claims is granted, and (2) Metro's motion for partial summary judgment on Ford's Robinson-Patman Act defenses is denied. Decision is deferred on the remaining motions, which address matters in which state law predominates, so that the state court — to which those matters are being remanded — can rule on them.

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2. Ford's affirmative claims against Metro and Foley include fraud, breach of contract, and breach of the duty of good faith and fair dealing. Ford also alleges a claim against Foley alone under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. First Amended Counterclaims and Third-Party Claims of Defendant Ford Motor Company ¶¶ 16-52, 54-60.

3. Metro's affirmative claims include breach of contract, promissory estoppel, unjust enrichment, negligent misrepresentation, violation of the Texas Deceptive Trade Practices Act ("DTPA"), and violation of the Texas Free Enterprise and Antitrust Act of 1983. Complaint ¶¶ 28-45. Foley's affirmative claim is for the intentional *infliction of* emotional distress. Counterclaim of Daniel H. Foley, Jr. ¶¶ 5-7.

4. Metro and Foley seek summary judgment on Ford's claims for fraud, breach of contract, and breach of the duty of good faith and fair dealing, and Foley seeks summary judgment on Ford's RICO claim. Metro and Foley's Motion for Partial Summary Judgment — Ford's Counterclaims and Third-Party Claims and Brief in Support.

Appendix B

I. BACKGROUND

This case arises from a dispute between Ford and Metro regarding Metro's use of Ford's Competitive Price Assistance ("CPA") program. Metro, a licensed motor vehicle dealer for Ford under a 1971 franchise agreement, purchases medium and heavy-duty trucks from Ford for resale to the public. Plaintiff's First Amended Complaint, Including Application for Permanent Injunction and Counterclaim of Daniel H. Foley, Jr. ("Complaint")[5] ¶¶ 8, 10; *see* Ford Heavy Duty Truck Sales Agreement, 3/26/71, and Amendments Thereto (collectively, "the Agreement"), attached as Exhibits 1-11 to the Affidavit of Daniel H. "Buck" Foley, Jr. in Support of Plaintiffs Application for Temporary Restraining Order and Temporary Injunction, attached as Exhibit A to the Complaint. Foley has been the dealer-principal of Metro since 1982. Affidavit of Sonia R. Ferguson ("Ferguson Affidavit"), Exhibit 4 at 8, attached to the Statement of Undisputed Facts in Support of Ford Motor Company's Motion for Summary Judgment.

During the 1990-94 period at issue in this case, all Ford medium and heavy truck dealerships were eligible to receive a base level of CPA called "Sales Advantage CPA" on every truck they purchased. *Id.*, Exhibit. 7 at 383. Sales Advantage CPA was obtained by calling Ford's "CPA Hotline" and providing the operator with the name of the customer, the specifications of the vehicle, and the options desired. *Id.* at 390. Additional "appeal CPA" could be obtained when the dealer filed a CPA appeal by facsimile to Ford's "CPA Central" demonstrating that more CPA was needed so that it could compete with the

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5. On November 13, 1996, the court granted Metro leave to file its first amended complaint.

prices of other dealers. *Id.* at 386. Alternatively, when the customer was one of the large volume purchasers designated by Ford, additional "leasing schedule CPA" was obtained by making a telephone call to the CPA Hotline. *Id.* at 426-27.

Metro alleges that, in 1988, it complained to Ford that it was not receiving as much CPA as were other dealers. Complaint ¶ 20. Pursuant to this complaint, Metro claims that James Wilson, who was a Ford district representative, instructed Metro to state on future CPA applications that its sales were being made to a "body company or national account" qualifying for additional CPA amounts beyond Sales Advantage CPA, even though this information was false. *Id.* Metro also claims that Kupper, Steckler, and Magnus knew of Metro's practices and did not tell Metro to change them. Metro made such false representations on subsequent CPA applications. *Id.* ¶ 21.

In April 1994, Ford conducted an audit of certain sales made by Metro. *Id.* ¶ 22. Following this audit, Ford concluded that, because these sales were not made to the customer named in Metro's CPA requests, Metro was required to refund the CPA discounts it had received. *Id.* According to Metro, Ford threatened to terminate the Agreement. *Id.* ¶ 24. Ford also allegedly threatened to "charge back" the CPA discounts against Metro's various accounts with Ford. *Id.* To prevent Ford from taking any of these actions, Metro filed the instant suit. *Id.*

The suit was filed in a state district court on July 19, 1994, asserting several causes of action under state law and seeking injunctive relief to prohibit Ford from terminating its franchise agreement with Metro. Plaintiff's Original Petition Including Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction at 8-17. On September

14, 1994, Ford filed counterclaims against Metro and a third-party petition against Foley, alleging several causes of action under state law. Counterclaims and Third-Party Claims of Defendant Ford Motor Company at 2, 6-9. On May 16, 1995, Metro filed an amended petition, which included a claim against Ford for price discrimination in violation of the Texas Antitrust Act and a counterclaim by Foley against Ford for intentional infliction of emotional distress. Plaintiffs First Amended Original Petition, Including Application for Permanent Injunction and Counterclaim of Daniel H. Foley, Jr. at 12-13, 17-19.

On May 30, 1995, the defendants removed the case to this court on the basis of federal question jurisdiction, asserting that Metro's price discrimination claim arose not under state but under *federal* law. Notice of Removal at 2. On June 28, 1995, Metro moved to remand, but the court denied the motion. *Metro Ford Truck Sales, Inc. v. Ford Motor Company, et al.*, 3:95-CV-1010-G, slip op. at 7-9 (N.D. Tex. Jan. 19, 1996). On January 19, 1996, Ford amended its counterclaims and third-party claims to include a claim against Foley under the Racketeering Influenced and Corrupt Organizations Art ("RICO"), 18 U.S.C. § 1961 *et seq*. First Amended Counterclaims and Third-Party Claims of Defendant Ford Motor Company ("Counterclaims and Third-Party Claims") at 6. On November 13, 1996, Metro filed its first amended complaint, adding claims under the Sherman Act, 15 U.S.C. § 1, and the Robinson-Patman Act, 15 U.S.C. § 13. Complaint at 13-14. On November 27, 1996, the defendants moved to dismiss certain of Metro's and Foley's claims, but the court denied the motion. *Metro Ford Truck Sales, Inc. v. Ford Motor Company, et al.*, 3:95-CV-1010-G, slip op. at 16 (N.D. Tex. Jul. 30, 1997).

Appendix B

The defendants now move for summary judgment on Metro's antitrust claims. Ford also moves for partial summary judgment on its affirmative claims against Metro and Foley and for partial summary judgment on the affirmative claims of Metro and Foley. Metro and Foley move for partial summary judgment on Ford's counterclaims and third-party claims, and Metro moves for partial summary judgment on Ford's Robinson-Patman Act defenses.

II. ANALYSIS

A. *Evidentially Burdens*

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).[6] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issue. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts.

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6. The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986). Instead, he must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson,* 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against the opponent if after adequate time for discovery, he fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

B. *Ford's Motion for Summary Judgment on Metro's Sherman Act Claim*

Metro-alleges that, pursuant to its CPA program, Ford engaged in vertical price fixing violation of § 1 of the Sherman Act.[7] Complaint ¶ 47. Vertical price fixing is illegal *per se* under § 1. *Business Electronics Corporation v. Sharp Electronics Corporation,* 485 U.S. 717, 724 (1988). To establish vertical price fixing, Metro must produce evidence of an agreement between Ford and its dealers to fix prices. See *Business Electronics Corporation v. Sharp Electronics Corporation*, 780 F.2d 1212, 1218 (5th Cir.) ("Nothing in *Monsanto [Company v. Spray-Rite Service Corporation*, 465 U.S. 752 (1984)] suggests that liability [for vertical restraints] can be found without any evidence of a price fixing agreement."), *aff'd*, 485

7. Section One, in relevant part, provides:

> Every contract, combination . . . , or conspiracy in restraint of trade . . . , is hereby declared to be illegal.

15 U.S.C. § 1.

U.S. 717 (1988). Evidence of an express agreement is not required; Metro can indirectly establish the existence of an agreement if it proves that Ford announced a retail price and took some course of action to enforce that price. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 794 (5th Cir. 1983).

Metro has submitted no evidence of an express agreement to fix retail prices. Instead, Metro argues, it has produced indirect evidence of an agreement. Metro alleges that Ford set wholesale truck prices at a level so high so as to make a CPA request necessary in every transaction. Complaint ¶ 11. Because Metro was dependent on CPA, Metro claims, Ford was in a position to set the ultimate retail price by means of the CPA price adjustment. *Id.* ¶ 13.

It is noteworthy that Metro does not allege an agreement between itself and Ford. Nor does Metro offer proof that Ford announced or enforced[8] retail prices. The result is that Metro was free to decide its own price. Indeed, one of Metro's own employees admits that Ford never demanded that Metro sell at a certain retail price or took any action against Metro for violating any such demand. Ferguson Affidavit, Exhibit 8 at 16-17; Metro's Response to Ford's Motion for Summary Judgment — Metro's Antitrust Claims at 10 n.2.

Ford set only wholesale prices, which it is legally entitled to do. See *Capital Ford Truck Sales, Inc. v. Ford Motor*

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8. Metro does allege that Ford enforced retail prices when it refused to deal and threatened to terminate Metro's franchise. Metro's Response to Ford's Motion for Summary Judgment — Metro's Antitrust Claims at 9. However, Ford's threats of termination came only after, and were pursuant to, Ford's discovery of Metro's fraudulent practices.

Company, 779 F. Supp. 1345, 1350 (N.D.Ga. 1990) (court found that Ford did not engage in vertical price fixing with respect to the same CPA program at issue in this case and for the same reasons set out here); *AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982) (court held that Seagram did not engage in vertical price fixing in regards to Seagram's discount program, which provided wholesale price discounts to large volume dealers, for the same reasons set out here), *cert. denied*, 461 U.S. 919 (1983); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-46 (8th Cir. 1983) (court found that Mack did not engage in vertical price fixing pursuant to its sales assistance program, which provided wholesale discounts for dealers so that they could meet retail price competition, for the same reasons set forth here), *cert. denied*, 467 U.S. 1226 (1984). Further, Ford's CPA program is actually pro-competitive. The effect of the discount program is to lower retail prices to customers and increase interbrand competition.[9] See *Capital Ford Truck Sales*, 779 F. Supp. at 1349; *AAA Liquors*, 705 F.2d at 1207-08; *Lewis Service Centers*, 714 F.2d at 848. Consequently, Metro cannot prevail on its vertical price funding claim under Section One of the Sherman Act.

C. *Ford's Motion for Summary Judgment on Metro's Robinson-Patman Act Claim and Metro's Motion for Partial Summary Judgment on Ford's Robinson-Patman Act Defenses*

Metro alleges that, pursuant to the CPA program, Ford engaged in price discrimination in violation of § 2(a) of the

9. Interbrand competition is the primary concern of antitrust law. *Business Electronics Corporation v. Sharp Electronics Corporation*, 485 U.S. 717, 724 (1988).

Robinson-Patman Act.[10] Complaint ¶ 49. To establish a violation of § 2(a), Metro must prove that (1) Ford's sales were in interstate commerce, (2) the trucks sold were of the same grade and quality as that sold to other dealers, (3) Ford discriminated in price between dealers, and (4) that the discrimination had a prohibited effect on competition. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). Moreover, for Metro to recover damages, it must prove the extent of its actual injuries. *Id.*

To resolve this claim, the court need only consider whether Ford discriminated in price between dealers. A pricing system which grants standard quantity discounts does not give rise to a price discrimination claim if the discounts are functionally available to all customers.[11] *See Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 42 (1948); *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 225 (5th Cir. 1973),

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10. Section 2(a), in pertinent part, reads:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition. . . .

15 U.S.C. § 13(a).

11. In its motion for partial summary judgment, on Ford's Robinson-Patman Act defenses, Metro fails to account for the fact that the CPA program is functionally available to all dealers and thus engages in a discussion regarding the "meeting competition" defense that is irrelevant to the resolution of Metro's Robinson-Patman Act claim. Consequently, Metro's motion for partial summary judgment on Ford's Robinson-Patman Act defenses is denied.

cert. denied, 414 U.S. 1136 (1974). Metro has failed, however, to submit probative evidence that the same level of CPA was not functionally available to all dealers.[12] To the contrary, the record reveals that the CPA program was open to all dealers on an equal basis and that Ford equalized the CPA given to every Ford dealer known to be bidding to the same customer. Ferguson Affidavit, Exhibit 7 at 389, 413-14. Indeed, it was even admitted by one of Metro's employees that she had never heard of any instances in which Ford gave more CPA to another dealer than to Metro when Metro was competing with another Ford dealer for the same retail customer. *Id.*, Exhibit 8 at 21. Metro's Robinson-Patman claim accordingly fails.

D. *Ford's Motion for Default Judgment on Its RICO Claim Against Foley*[13]

Under Fed. R. Civ. P. 55(a),[14] Ford moves for default judgment with respect to its RICO claim. Ford Motor

12. Metro argues that Ford, in its third request for admissions, admitted that it gave different amounts of CPA on "comparable vehicles." Metro's Response to Ford's Motion for Summary Judgment — Metro's Antitrust Claims at 19. However, this admission does not prove that Ford discriminated in price among dealers. It only highlights the fact that the amount of CPA varied with the competitive situation. Two identical trucks could receive various levels of CPA, depending on whether the sale qualified for sales advantage, appeal level, or leasing schedule CPA. The important fact is that no matter what level of CPA applied, that level was available to all dealers.

13. Ford incorporates its motion for default judgment as a part of its motion for partial summary judgment on its affirmative claims.

14. Rule 55(a) provides:

When a party against whom a judgment for affirmative

(Cont'd)

Company's Motion for Partial Summary Judgment on its Affirmative Claims Against Metro Ford Truck Sales, Inc. and Daniel H. Foley, Jr. at 18. Ford asserts that Foley failed to answer its amended third party complaint filed January 19, 1996, which pleads the RICO claim. *Id.* at 18. On August 11, 1997, in response to Ford's motion for default judgment, Foley moved for leave to file an answer to the amended third-party complaint, but the court denied the motion. *Metro Ford Truck Sales, Inc. v. Ford Motor Company, et al.*, 3:95-CV-1010-G (N.D. Tex. Aug. 26, 1997).

"Generally, the entry of default judgment is committed to the discretion of the district judge." *Mason v. Lister,* 562 F.2d 343, 345 (5th Cir. 1977); *see Familia De Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1137-38 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981). However, this discretion is limited: "Default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations." *Sun Bank of Ocala v. Pelican Homestead and Savings Association,* 874 F.2d 274, 276 (5th Cir. 1989). Indeed, default judgment is " 'available only when the adversary process has been halted because of an essentially unresponsive party.' " *Id.* (quoting *H.F. Livermore Corporation v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970)).

Although Foley failed to timely answer Ford's first amended third-party claims, that failure did not prevent this

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(Cont'd)

> relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

case from moving forward, and thus default judgment is not warranted under the circumstances.

E. *Matters in Which State Law Predominates*

Pursuant to revised 28 § 1441(c),[15] a district court has the discretion to remand all "matters" (including federal claims) in which state law "predominates." *Eastus v. Blue Bell Creameries,* 97 F.3d 100, 106 (5th Cir. 1996). The matters remaining in this case are a RICO claim and state law claims of fraud, breach of contract, breach of the duty of good faith and fair dealing, promissory estoppel, unjust enrichment, negligent misrepresentation, intentional infliction of emotional distress, violation of the DTPA, and violation of the Texas Free Enterprise and Antitrust Act of 1983. As Ford argued at the pre-trial conference, there is a "substantial overlap"[16] between the remaining RICO and state law claims. Specifically, Ford argued that Metro's alleged fraudulent practices in obtaining CPA is the thread common to the remaining claims, and that

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15. 28 U.S.C. § 1441(c), which was revised in 1990, presently provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 [federal question jurisdiction] of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

16. Ford used this term at the pre-trial conference on October 15, 1997, in support of keeping all of the claims in this court. Ford urged the court not to remand the state law claims because they involve almost

the measure of damages for the RICO claim is only "slightly different" from the measure of damages for the state claims. Finding itself in agreement with this argument (although admittedly in a slightly different context), the court concludes that the remaining claims are all matters in which state law predominates and that remand is warranted in the interest of judicial economy, convenience, fairness, and comity.

III. CONCLUSION

After careful consideration of the briefs and record in this case, the court concludes that Ford has demonstrated that no genuine issues of material fact exist as to Metro's antitrust claims. Accordingly, Ford's motion for summary judgment on Metro's antitrust claims is **GRANTED**, and Metro's motion for partial summary judgment on Ford's Robinson-Patman Act defenses is **DENIED**.

The remaining claims of Metro, Foley and Ford, all of which are matters in which state law predominates, are **REMANDED** to the 44th Judicial District Court of Dallas County, Texas. The clerk shall mail a certified copy of this memorandum order to the district clerk of Dallas County, Texas. 28 U.S.C. § 1447(c).

SO ORDERED.

October 20, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 28, 1998

IN THE UNITED STATES DISTRICT COURT

FOR THE FIFTH CIRCUIT

No. 97-11218

METRO FORD TRUCK SALES INC

Plaintiff - Appellant - Appellee

v.

FORD MOTOR COMPANY

Defendant Counter Defendant - Third Party Plaintiff - Appellee - Appellant

DUANE KUPPER; ERIC MAGNUS, MIKE STECKLER

Defendants - Appellants

v.

DANIEL H FOLEY

Counter Claimant - Third Party Defendant - Appellee

Appeals from the United States District Court for the Northern District of Texas, Dallas

Appendix C

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/26/98, 5 Cir., ____, ____ F.3d ____)

Before POLITZ, Chief Judge, REYNALDO G. GARZA and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing on behalf of Metro Ford Truck Sales, Inc. is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc on behalf of Metro Ford Truck Sales, Inc. is also DENIED.

* * *

ENTERED FOR THE COURT

s/ Henry A. Politz
Chief Judge

Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

No. 98-679

In The

Supreme Court of the United States

October Term, 1998

METRO FORD TRUCK SALES, INC.,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 1 of the Sherman Act proscribes purely unilateral conduct.

2. Whether there is any evidence to support Petitioner's new argument in this Court that there was an "implied" agreement to fix prices in violation of § 1 of the Sherman Act.

3. Whether summary judgment was properly granted on Petitioner's Robinson-Patman price-discrimination claim because Petitioner presented no evidence to support that claim.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. However, the following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

The Hertz Corporation

FRN of San Diego, LLC

FRN of Tulsa, LLC

Argentina

Invercred Compania Financiera S.A.

Australia

Ford Motor Company of Australia Limited

Belgium

Ford Motor Company (Belgium) N.V.

Brazil

Autolatina Comercio e Participacoes Financerias Ltd.

Denmark

Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft

Holland
Ford Nederland B.V.

Japan
- Mazda Motors Corporation

Korea
Ford Motor Company of Korea

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

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STATEMENT OF THE CASE

A. Underlying Facts.

This is an antitrust action brought by Metro Ford Truck Sales, Inc. ("Metro") against Ford Motor Company ("Ford").

Ford sells its medium and heavy trucks almost exclusively to authorized Ford dealerships throughout the United States.[1] To meet the competition of other manufacturers, Ford offers its dealerships what is known as Competitive Price Assistance, or CPA. CPA is an allowance given by Ford to the dealership to reduce the wholesale price of the truck to enable the dealer to meet competition from other sellers. (SUF ¶¶ 24-25)[2]

During the 1990-94 period at issue here, all Ford medium and heavy truck dealerships were eligible to receive a standardized base level of

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[1] Metro inexplicably asserts that Ford's sale of heavy trucks is "[u]nlike all other products" because "Ford does not sell heavy trucks at retail." (Pet. at 3) Of course, this Court may take judicial notice that Ford typically does not sell *any* products at retail.

[2] "SUF" refers to Ford's Statement of Undisputed Facts in Support of Ford Motor Company's Motions for Summary Judgment, filed in the trial court. The evidence supporting each numbered paragraph of this statement was attached to the statement.

CPA, called "Sales Advantage," on every truck they purchased. (SUF ¶ ¶¶ 8, 27, 118) If dealerships could demonstrate that higher concessions were necessary for them to meet competition, they could request additional price reductions, called "Appeal Level CPA," by filing an appeal form with Ford's "CPA Central." (SUF ¶¶ 8, 31-33) Dealerships were required to substantiate competitive need with information such as a copy of a competitive quote obtained from the customer, a statement by the dealership that they had been shown a competitive quotation by the customer, or a brief history of recent bids to the account, or similar accounts, which indicate the amount of pricing assistance currently offered by the competition. (SUF ¶36)

Ford's CPA pricing managers reviewed the appeal form against previous bid histories involving the same customer, and against successful and unsuccessful bids of similar vehicles in the same region and around the country, to determine the amount of additional CPA that Ford would grant based on Ford's evaluation of competitive need. (SUF ¶ 41) Where Ford was aware that more than one Ford dealership was bidding to the same customer, Ford's policy was to equalize the Appeal Level CPA granted to each dealership. (SUF ¶ 26) As a result, Ford dealerships that were in direct competition for the same retail customers received

the same Appeal Level CPA. (SUF ¶¶ 8, 10-12, 26, 46, 118-120)[3]

Metro has *admitted* that Metro, for the purpose of securing more CPA than Ford would otherwise have allowed, *systematically* represented that trucks were being sold to certain customers when in fact the trucks were being sold to other, unrelated customers. (SUF ¶¶ 48-50, 52, 53, 64-66, 69) Metro has *admitted* to making these fraudulent representations in connection with the sale of 317 trucks in two years alone. (SUF ¶ 53) Further, Metro has *admitted* that it created an entire set of dummy files—one containing the names of the real customers and the other the names of the fictitious customers—to conceal the true information from Ford's auditors. (SUF ¶¶ 53, 61-63)

Ford discovered Metro's fraudulent scheme and conducted an audit in 1994. (SUF ¶ 123) Although Ford was the victim of Metro's admitted

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[3] For sales to certain customers whose purchases commonly attracted intense competition, including heavy truck leasing companies, Ford streamlined the appeal process by providing standardized schedules of higher allowances. To obtain standardized allowances for sales to these customers, a dealership was not required to demonstrate individualized competitive need. All that was necessary was a telephone call to Ford's CPA Hotline in Kentucky, identifying the eligible customer and the vehicles and options needed. (SUF ¶¶ 10-12, 46-47)

fraud, it was *Metro* that commenced the present action against *Ford*.

B. Proceedings in the District Court

In the district court, Metro claimed that Ford's CPA program constituted vertical price fixing that is illegal *per se* under § 1 of the Sherman Act, 15 U.S.C. § 1. The district court granted summary judgment for Ford on this claim. The district court held that there was no evidence of an agreement to fix prices, that Metro had offered no proof that Ford announced or enforced retail prices, that the evidence showed that Metro was free to decide its own prices, and that Ford "set only wholesale prices, which it is legally entitled to do." (App. 24a-26a)[4]

Metro also claimed that Ford had engaged in price discrimination in violation of § 2(a) of the Robinson-Patman Act. The district court granted summary judgment for Ford on this claim as well, holding that "the record reveals that the CPA program was open to all dealers on an equal basis and that Ford equalized the CPA given to every Ford dealer known to be bidding to the same customer." (App. 28a)

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[4] "App" refers to the Appendix to the Petition for Writ of Certiorari.

C. Proceedings in the Court of Appeals

Metro appealed to the United States Court of Appeals for the Fifth Circuit. In its appellate brief, Metro expressly conceded that its price-fixing claim under the Sherman Act was based on Ford's "unilateral" conduct. (Brief of Plaintiff-Appellant at 16, 17, 23) In fact, in its reply brief Metro characterized its case as a "purely-unilateral" price fixing case. (Reply Brief of Plaintiff-Appellant at 3) The Fifth Circuit observed that "the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter." (App. 8a) Accordingly, it affirmed the district court's conclusion that the lack of a "contract, combination ... or conspiracy" precluded Metro's Sherman Act claim. (App. 8a-9a)

The Fifth Circuit also affirmed the dismissal of Metro's Robinson-Patman price discrimination claim:

> As found by the district court, the record reflects that Metro was treated the same as all other Ford dealers with respect to CPA for the same customer, and products of like grade and quality. The record further establishes that the CPA program functioned to ensure that all Ford dealers issuing bids to the same customer received equal CPA, and that all Ford dealers could meet the compe-

> tition from other original equipment manufacturers. Metro concedes that the discounts were available to it on an equal basis with other Ford dealers. We therefore must find that price discrimination did not exist, and that no violation of the Robinson-Patman Act occurred.

(App. 10a-11a)

REASONS FOR DENYING THE WRIT

I. FORD WAS ENTITLED TO SUMMARY JUDGMENT ON METRO'S VERTICAL PRICE FIXING CLAIM

In the Court of Appeals, Metro made no attempt to challenge the district court's conclusion that Metro had produced no evidence of an agreement between Ford and its dealers to fix retail prices. Instead, Metro argued that § 1 of the Sherman Act was broad enough to proscribe conduct by Ford that Metro itself characterized as "purely unilateral." In this Court, Metro appears to repeat its untenable argument that "unilateral" conduct can be *per se* illegal under § 1 of the Sherman Act. Now, however, Metro also argues, belatedly, that the evidence also shows an "implicit 'agreement'" to fix prices. Both arguments are completely without merit. The evidence shows without contradiction that Metro was at all times free to charge whatever retail price it

wished; Ford can be found guilty of fixing prices in this case only if setting wholesale prices constitutes price fixing, an obviously untenable conclusion.

A. The Court of Appeals Properly Rejected Metro's Argument That Section 1 of the Sherman Act Proscribes Unilateral Conduct

Metro's argument that § 1 of the Sherman Act proscribes purely unilateral conduct was properly rejected by the Fifth Circuit. Section 1 of the Sherman Act expressly and unambiguously declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. Accordingly, there can be no reasonable debate that proof of a violation of this section *always* requires proof of a "contract, combination ... or conspiracy"—i.e., concerted action of some sort—even in a vertical price-fixing case. *See, e.g., Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 735-736 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

Metro baldly asserts that this Court in *Business Electronics* and *Monsanto* "reiterated" the rule that "unilateral" vertical price restraints are *per se* illegal under Section 1 of the Sherman Act." (Pet. at 9-10) But in *Business Electronics*, this Court expressly held that a "vertical restraint is not

illegal *per se* unless it includes some agreement on price or price levels." 485 U.S. at 735-736. Similarly, in *Monsanto*, this Court expressly reaffirmed that "[o]n a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." 465 U.S. at 763. In fact, this Court in *Monsanto* emphasized the "basic distinction between concerted and independent action" and once again stated unequivocally that "independent action is *not* proscribed." *Id.* (emphasis added).

Thus, it unquestionably remains the law that § 1 of the Sherman Act "does not reach conduct that is 'wholly unilateral,'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), and the Fifth Circuit properly rejected Metro's completely unsupported argument to the contrary.

B. Metro Has Produced No Evidence From Which A "Contract, Combination ... Or Conspiracy" To Fix Prices May Be Inferred.

Now, in this Court, Metro belatedly argues that the evidence in this case shows that there was an "implicit 'agreement'" to fix prices. (Pet. at 10) Assuming that Metro may properly make this argument in this Court without having made it in the Court of Appeals, it is without merit.

As the district court recognized, liability for vertical price fixing under the Sherman Act does not require evidence of an express agreement to fix prices. Rather, as the district court also recognized, "Metro can indirectly establish the existence of an agreement if it proves that Ford announced a retail price and took some course of action to enforce that price." (App. 25a) *See, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *J. T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 794 (5th Cir. 1983). But the district court granted Ford's motion for summary judgment because Metro produced no evidence that Ford announced a retail price or took any action to enforce that announced price. (App. 25a)

Metro has never challenged the factual basis for the district court's holding, neither in the Fifth Circuit nor in this Court. In fact, the undisputed testimony of Metro's sales staff was that Ford never instructed Metro not to sell above or below a particular price, and that Ford never threatened or took any action against Metro for violating such a hypothetical instruction. (SUF ¶ 121) Further, Metro conceded below that its own sales staff "believ[es] Ford has nothing to do with controlling the retail prices they can charge." (Metro's Response to Ford's Motion for Summary Judgment-Metro's Antitrust Claims at 10). Thus, if Ford did announce a retail price, it was a secret even from those individuals who actually negotiated Metro's retail sales.

Nevertheless, Metro argues that "[d]ealers 'agree' to sell at the retail price Ford fixes *because they have no choice but to do so.*" (Pet. at 10, emphasis in original) Apparently, Metro's claim is that dealers "have no choice" because the wholesale price ultimately set by Ford through CPA allowances "fix[es] the lower limit of the price range (i.e., the price floor) below which a dealer cannot profitably resell a truck." (Pet. at 4-5) Thus, Metro's argument in this Court appears to be simply that Ford and its dealers implicitly "agree" to fix prices because Ford sets a wholesale price and dealers agree to buy at that wholesale price, thereby effectively "fixing" a retail price below which the dealer cannot profitably sell.

Of course, no retailer can profitably sell a product below its wholesale price. Therefore, *every* wholesale price "fixes" a retail price floor below which the retailer cannot profitably sell. Nevertheless, setting a wholesale price is not retail price fixing, because the retailer always remains free to decide for itself the retail price to charge, the profit margin it finds acceptable under the circumstances, and whether legitimate business considerations justify selling at a loss. In this case, for example, Metro at all times remained free to lower its prices to the maximum extent consistent with its own view of an acceptable profit margin, and Ford had no obligation to lower its wholesale prices (and perhaps sell to Metro at a loss) solely

to increase Metro's margin to a level deemed acceptable to Metro.

Under these circumstances, "[t]he decision as to what margin to use and when to change it, and consequently what retail price to charge remains [Metro's], and ...such economic impact as follows from [Ford's] tight control of its own wholesale pricing is not a Sherman Act violation." *Butera v. Sun Oil Co.*, 496 F.2d 434, 438 (1st Cir. 1974). In fact, as the district court observed, at least three courts have upheld Ford's pricing system or systems remarkably similar to Ford's. *AAA Liquors, Inc. v. Joseph E. Seagrams & Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 779 F. Supp. 1345 (N.D. Ga. 1990)(upholding Ford's CPA system against the same Sherman Act challenge made here).

Metro relies heavily on the decision in *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), but the facts of that case are so obviously dissimilar to the facts here that it is hardly surprising that neither of the courts below saw any need to even cite that decision. In *Greene*, the manufacturer of coffee, General Foods, entered into an express contract with its retailer which apparently obligated the retailer to sell coffee to certain institutional accounts (known as MFSA accounts) at certain

specified prices "in accordance with General Foods' national MFSA price list." 517 F.2d at 641. When the retailer "attempted to sell to MFSA's at a higher price, he was directed to adhere to the MFSA formula." 517 F.2d at 643. When the retailer failed to adhere to the pricing system, his distributorship agreement was terminated. 517 F.2d at 658. Thus, *Greene,* unlike this case, involved an express agreement between the manufacturer and the retailer to fix the MFSA prices, an agreement that the manufacturer enforced through terminating the retailer's dealership agreement. There is no comparable evidence in this case.

In short, the district court in this case was correct when it held that "Ford set only wholesale prices, which it is legally entitled to do." (App. 25a)[5]

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[5] Metro also relies on this Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which it characterized in the Court of Appeals as a "purely-unilateral [resale price maintenance] case." (Reply Brief at 3) But *Dr. Miles* involved express contracts between a manufacturer and its retailers that expressly prohibited the retailers from "sell[ing] or furnish[ing] the [products] to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages." 220 U.S. at 380. In short, *Dr. Miles* plainly did not involve purely unilateral conduct; on the contrary, like *Greene*, it literally involved an express contract to fix prices.

II. The District Court Properly Dismissed Metro's Robinson-Patman Act Price Discrimination Claim

Metro's price discrimination claim under the Robinson-Patman Act was properly dismissed by the district court, and that ruling was properly affirmed by the Fifth Circuit, because Metro made no attempt to show that CPA was not functionally available to Metro on the same terms that it was made available to all other Ford dealers. But Metro's price discrimination claim also fails for other reasons advanced by Ford in the district court that the district court and the Fifth Circuit had no need to address. Specifically, Metro failed to present any evidence of two or more reasonably contemporaneous sales of goods of "like grade and quality" and further failed to present any evidence of any injury to competition.

A. The District Court Correctly Determined That Metro Failed To Prove Discrimination Because It Failed To Prove That CPA Was Not Functionally Available To All Ford Dealers, Including Metro

Section 2(a) of the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodi-

> ties of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C.A. § 13(a). "In short the Act, as its language indicates, requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances." *FLM Collision Parts, Inc., v. Ford Motor Co.,* 543 F.2d 1019, 1026 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

"[E]ven when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, there is no violation of § 2(a)." *Id.* at 1025-1026 (citation omitted). If discounts are "functionally available to the plaintiffs, then as a matter of law either there is no price discrimination or the discrimination is not the proximate cause of the injury." *Comcoa, Inc. v. NEC Telephones, Inc.,* 931 F.2d 655, 664, 665 (10th Cir. 1991)(instruction to this effect was "an accurate statement of the law"); *accord, e.g., Bouldis v. U.S. Suzuki Motor Corp*, 711 F.2d 1319, 1326 (6th Cir. 1983)(price concessions and allowances "will not give rise to a Robinson-Patman violation if the concessions are available

equally and functionally to all customers"); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S.897 (1981)("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury."); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 120 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)("a uniform pricing formula applicable to all customers is not a price discrimination under the act"); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1568, 1571 (N.D. Ga. 1992)("Plaintiffs must also show that ... the price discrimination involved a discount that was not 'functionally available' to [the dealer] on equal terms"; Ford's motion for summary judgment granted because CPA on CF-8000 trucks was "functionally available to [the dealer]"); *Rod Baxter Imports v. Saab-Scania of America, Inc.*, 489 F. Supp. 245, 248 n. 2 (D. Minn. 1980)("If the bonuses were available to all competitors on the same terms, then the bonuses would not be discriminatory ... .").

Thus, the district court in this case correctly recognized that Metro could not prevail absent "probative evidence that the same level of CPA was not functionally available to all dealers." (App. 28a) Further, it correctly concluded that Metro had failed to submit such evidence. *(Id.)* In

fact, as the district court recognized, the uncontroverted evidence affirmatively established all of the following:

1. Ford's CPA program "was open to all dealers on an equal basis." (App. 28a)
2. "Ford equalized the CPA given to every Ford dealer known to be bidding to the same customer." (App. 28a)[6]
3. Dealers selling identical trucks to different customers could receive various levels of CPA, depending upon whether the sales qualified for Sales Advantage CPA, Appeal Level CPA, or Leasing Schedule CPA, but this "only highlights the fact that the amount of CPA varied with the competitive situation"; "the important fact is that no matter what level of CPA applied, that level was available to all dealers." (App. 28a n.12)

In this Court, Metro mischaracterizes the holdings of the district court and the Fifth Circuit by assuming that they rest exclusively upon the second point, i.e., the fact that two dealers bidding to sell to the same customer will receive the same

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[6] Metro asserts that Ford's "equalization" policy is not a "proven reality" but is based "on Ford's self-serving *representations* that equalization occurs." (Pet. at 18) In fact, however, Ford's policy of equalizing CPA is established by uncontroverted, sworn deposition testimony. (SUF, Ferguson Aff., Exhibit 7 at 410, 413-414).

amount of CPA. Metro ignores altogether the more general point: the amount of CPA granted does vary based upon varying competitive situations, but given the same competitive situations the same level of CPA would be available to all dealers. (SUF ¶¶ 117-120)[7]

B. Metro's Price Discrimination Claim Fails For Other Reasons As Well.

In the district court, Ford advanced other reasons why it was entitled to summary judgment on Metro's price discrimination claim. The district court and the Fifth Circuit did not need to address these other issues, but Ford is entitled to defend the judgment based on any ground supported by the record. *E.g., Bennett v. Spear*, 520 U.S. 154, 181 (1997).

First, to prevail under Robinson-Patman, Metro was obligated under the express terms of

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[7] Metro asserts that Ford "can decide which dealers receive lower prices, which in turn allows Ford to choose the dealers it believes it can later 'control' and favor them with lower prices all around." (Pet. at 17) Metro also suggests that Ford has "favored" and "disfavored" dealers and that Ford grants larger CPA allowances to the former. (*Id.*) Metro cites no evidence to support these claims. In fact, the uncontroverted, sworn deposition testimony establishes that the identity of the dealer is not a consideration in determining the level of CPA to be awarded. (SUF, Ferguson Aff., Exhibit 7 at 389)

the statute to show that two or more sales of items of "like grade and quality" were made at different prices. 15 U.S.C. § 13(a). Thus, a "threshold finding" essential to the applicability of § 2(a) is that the goods allegedly sold at discriminatory prices were of "like grade and quality." *F.T.C. v. Borden Co.*, 383 U.S. 637, 639 (1966). But Metro has made no attempt to identify *any* transactions in which Ford sold two or more trucks of "like grade and quality" at different prices.[8]

Even if Metro had identified two or more sales of comparable trucks, it would have been required to prove that those sales were "reasonably contemporaneous in that they 'must (1) have been entered into within a reasonably short time period and (2) contemplate reasonably simultaneous delivery of the goods involved in the transaction." *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 683 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984); *accord, e.g., Capital Ford*, 819 F. Supp. at 1572 (contracts entered into at different times "are not the proper subject of a price discrimination claim"). But in its response to Ford's motion for summary judgment, Metro did not even argue that there were any such "reasonably con-

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[8] *A fortiori*, of course, Metro has presented no evidence of any transactions in which Ford sold two or more trucks of "like grade and quality" at different prices under the same competitive circumstances.

temporaneous" sales; thus, Metro effectively conceded the issue. (Metro's Response to Ford's Motion for Summary Judgment-Metro's Antitrust Claims, at 27-28) For this reason as well the district court's judgment must be affirmed.

Finally, "[e]ven if the sales at different prices are contemporaneous [and] involve goods of like grade and quality ... recovery under the Act is precluded absent proof that the price variance detrimentally affected competition." *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). Thus, Metro was required to prove "that the result of price discrimination 'is likely to be a severe, adverse effect on competition.'" *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Nevertheless, Metro's "expert" admitted that he had made no attempt to determine if the alleged price discrimination had any effect on competition. As Metro made no attempt to prove the requisite effect on competition, the district court's judgment must be affirmed for this reason as well.

CONCLUSION

Metro's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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